Supreme Court, U.S.
FILED

03 60 APR 30 2003

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

DR. DIANA LeBRETON - PETITIONER

VS.

**PENDLETON MEMORIAL METHODIST HOSPITAL,
PATRICK C. BREAUX, M.D.,
FELIX O. RABITO, M.D., and
THOMAS A. KREFFT, M.D.**

ON PETITION FOR WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

**Dr. Diana LeBreton
16050 Plank Road
Baker, Louisiana 70714
(225) 356-3489**

QUESTIONS PRESENTED FOR REVIEW

1) Did Petitioner's father have a liberty interest under the Due Process Clause of the Fourteenth Amendment to be reasonably safe and secure from intentional euthanization at a time when he was mentally incompetent? If so, was this liberty interest a "fundamental" right?

2) Did Petitioner's father have a right to privacy under the Due Process Clause of the Fourteenth Amendment which included the right to be reasonably safe and secure from intentional euthanization at a time when he was mentally incompetent? If so, was this right to privacy a fundamental right?

3) If the hospital in which Petitioner's father was intentionally euthanized, and the doctors who euthanized Petitioner's father acted under color of law, did their actions amount to "State Action"?

4) Did the Louisiana Supreme Court deny Petitioner's right to property under the Due Process Clause of the Fourteenth Amendment when it denied Petitioner's application for writ of certiorari and/or review in the manner done?

5) Is "relatives of persons who are sick and mentally incompetent" a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is it a "suspect class"?

6. Did the actions of the Louisiana Supreme Court, in denying Petitioner's application for writ of certiorari and/or review on the basis of *res judicata* create a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is this a "suspect class"?

7. Is "sick and mentally incompetent adults whose physicians have falsified death certificates and conspired with hospitals to euthanize them" a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is this a "suspect class"?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **state court**:

The denial of Petitioner's Application for Writ of Certiorari and/or Review to the Louisiana Fourth Circuit Court of Appeal appears at Appendix A.

The opinion of the Louisiana Fourth Circuit Court of Appeal appears at Appendix B to the petition.

JURISDICTION

[x] For cases from state courts:

The date on which the highest state court decided my case was January 31, 2003. A copy of that ruling appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 1
U.S. Const. amend. 14, § 1
28 U.S.C. § 1257(a)
Supreme Court Rules, Rule 10.1(c)
La. Civ. Code art. 3462
La. Rev. Stat. 40:1299.47(A)(2)(a)

STATEMENT OF THE CASE

A. Factual Background

My name is Dr. Diana LeBreton. I am a doctor of optometry and the daughter of Albert L. LeBreton, Jr. My father was admitted to Pendleton Memorial Methodist Hospital in New Orleans, Louisiana, on August 13, 1991. The diagnosis was acute myocardial infarction, with brief cessation of pulse and breathing in the ambulance en route to the hospital. He was successfully revived at the hospital and ventilated by endotracheal intubation. He was able to breath on his own after that.

Between his admission on August 13, and his death one week later, my father's condition actually improved, yet his attending physicians made the highly subjective decision to recommend the radical procedure of withdrawing all life-sustaining treatment. Our family, with the exception of myself, was persuaded by the doctors to discontinue food, hydration, antibiotic therapy, and intravenous fluids, effectively starving my father to death.

Despite being diagnosed repeatedly as "semi-comatose," rather than comatose, despite exhibiting only "moderate brain injury" on the Glascow Coma Scale, and despite showing definite neurological improvement on electroencephalographs (EEGs), the doctors nonetheless concluded that my father should be removed from life-sustaining treatment. In their subjective opinions his life would be "less meaningful" if he recovered.

In fact, on August 15, 1991, a neurologist not associated with the case opined that, based on an EEG he performed on

that date, and the fact that my father was breathing on his own and blinking his eyes spontaneously, he had improved neurologically and was responding to auditory stimuli. He had also withdrawn from a pin prick.

That same day, Dr. Thomas Krefft wrote on my father's chart that his recovery would not be "meaningful." The next day, Dr. Krefft announced that he disagreed with the other neurologist's findings. On August 17, 1991, Dr. Patrick Breaux stated that in his view the prognosis was "poor" for my father's "meaningful recovery." The next day Dr. Breaux suggested to my mother, Frances, that "any artificial means of support" should be discontinued. My mother, who was completely mentally distraught by that time, reluctantly assented; however, at the time it was not explained to her that this meant withdrawal of the feeding tube, all intravenous liquids, all hydration, and all medication (which is what the doctors meant by "artificial means of support"). She thought only the feeding tube would be removed. That same day Dr. Breaux ordered the withdrawal of all food, hydration, intravenous fluids, and medication.

The withdrawal of life-sustaining treatment created significant strife in my family. As a result, Dr. Felix Rabito, the third physician attending my father, tried to reconcile the family's differences. However, despite my repeated protests, and my mother's vacillation, Dr. Rabito refused to reinstate life-sustaining treatment. During this time frame, Dr. Breaux grew more forceful, even telling my mother that "we're all dying," in response to her question whether or not her husband was dying as a result of the doctors' actions. When my mother asked if the "I.V." could be reinserted, Dr. Breaux lied and said my father's veins could not take it.

On August 19, despite having been off life-sustaining treatment for over twenty-four hours, my father was "stable from a cardiac standpoint." Another EEG likewise revealed only "moderately sever diffuse encephalopathy." Again, despite his ostensibly improving condition, life-sustaining treatment continued to be withheld. I asked a nurse that day if she could give my father a sip of water. She replied that she could not, but that I could if I wanted to.

Albert L. LeBreton, Jr., died on August 20, 1991, at 4:00 o'clock in the afternoon. He was gasping for breath until the very end, yet the nurses were prohibited from ventilating him because of the orders of Drs. Krefft, Breaux, and Rabito. At the time those orders were given it was unlawful in Louisiana to withdraw food and water regardless of the circumstances.

Dr. Rabito advised that the cause of death was a stroke, but on the Death Certificates given to my family the cause of death had been left blank. Two weeks later three other causes of death were recorded. Six months later Dr. Rabito made a note in the hospital records that my father had been "brain dead" prior to the pronouncement of death at 4:00 p.m. on August 20; however, his EEGs had consistently reflected brain-wave activity and neurological function.

I originally filed suit before the statute of limitations (referred to as "liberative prescription" in Louisiana) for torts expired in August 1992. In that lawsuit, I alleged that Drs. Krefft, Breaux and Rabito intentionally euthanized my father by providing my mother, and my siblings incorrect information about my father's medical condition. His death has left my mother and me psychologically traumatized. Worse, however, I fear that other relatives of semi-comatose persons may lose their loved ones as a result of being similarly misinformed by

physicians bent on euthanizing those whom they subjectively determine might not have the best quality of life after recovery.

After the suit was filed, it was dismissed without prejudice, pending review by a panel of physicians, and ruling by that panel. My counsel at the time failed to reinstate the suit in a timely manner, and it was dismissed with prejudice.

I then filed another suit in state district court, based on different claims and legal theories, hoping to apply the ten-year statute of limitations for personal actions. The suit was dismissed as *res judicata*, on the basis of having already been litigated in the first suit. In order for *res judicata* to apply in Louisiana, the previous suit has to have involved identical parties and claims, and has to have been a "final judgment on the merits." But in the first suit, the trial court denied the defendants objections. The court of appeal affirmed, and then the Louisiana Supreme Court reversed. Therefore, there was never a final judgment on the merits. The trial court's ruling was interlocutory. Moreover, in the second suit I added the hospital as a defendant, and asserted different claims.

My rights, and those of my father, under the Due Process and Equal Protection clauses of the Fourteenth Amendment, have been infringed upon by the actions of Drs. Krefft, Breaux, and Rabito, and by those of Pendleton Memorial Methodist Hospital. Moreover, the state of Louisiana also infringed on those rights by ruling that the prior case was *res judicata* when the decree was interlocutory, and not final in nature.

B. Procedural Background

I filed suit on August 17, 2001, seeking damages against the doctors and the hospital where my father, Albert L. LeBreton, Jr., was treated and ultimately euthanized. Contrary to the contentions of the defendants in that case, the claims asserted in the August 2001 lawsuit were substantially different from those asserted in the first and second lawsuits.

The initial petition, filed in August 1992, sought a declaratory judgment pursuant to a state statute cited in the petition itself. That suit was interrupted by protracted Medical Review Panel proceedings, culminating in a ruling against Petitioner in August 1996, some four years after the suit was filed.

I then resurrected my suit in February 1997. The defendants objected to the suit, in the form of a "peremptory exception of prescription," claiming that the statute of limitations had run. The trial court denied the objection, and the court of appeal affirmed. The Louisiana Supreme Court reversed, and ruled that the limitations period had not been tolled, reversing Hernandez v. Lafayette Bone & Joint Clinic, 467 So.2d 113 (La.App. 3 Cir.1985), a long-standing state appellate court decision to the contrary, which had been *stare decisis*.

The 2001 lawsuit alleged that the doctors and hospital acted under color of law when treating my father, and violated his constitutional rights. It also alleged violations of the Louisiana Unfair Trade Practice Act, La. Rev. Stat. 51:1401, *et seq*. Despite the obvious differences between the two lawsuits, the Louisiana courts nonetheless held that the second suit was *res judicata*, and dismissed it.

REASONS FOR GRANTING THE PETITION

A. Substantive Due Process "Liberty" Interest

The Fourteenth Amendment states in part that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14, §1. My father, Albert L. LeBreton, Jr., had a "liberty" interest under the Due Process clause to be reasonably safe and secure from intentional euthanization at a time when he was ill and mentally incompetent.

This Court has routinely examined our Nation's history, legal traditions, and practices, when examining due-process cases. See, e.g., Planned Parenthood v. Casey, 505 US 833, 849-850 (1992); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269-279 (1990); Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

My father was at least entitled to be reasonably safe and secure while confined to the hospital, but he was denied that right by the actions of Drs. Patrick Breaux, Thomas Krefft, and Felix Rabito, who misrepresented my father's condition to us. See, e.g., Youngblood v. Romero, 457 U.S. 307 (1982). Arguably, my father also had a similar right to privacy which was infringed on by the doctors. See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

My father's life was taken by Drs. Breaux, Krefft, and Rabito as surely as if they had administered a lethal dose of some drug. My father's life was taken intentionally, and these doctors conspired and were accessories to the intentional taking of his life. See, e.g., Washington v. Glucksberg, No. 96-110 (Bench Opinion) p.10, citing Commonwealth v. Bower, 13

Mass. 356 (1816), and, 3 J.Stephen, A History of the Criminal Law of England 16 (1883). In Glucksberg, Chief Justice Rehnquist wrote, at pages 10-11:

> ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable"). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "[t]he life of those whom life ha[d] become a burden – of those who [were] hopelessly diseased or fatally wounded – nay, even the lives of criminals condemned to death, [were] under the protection of law, equally as the lives who [were] in the full tide of life's enjoyment, and anxious to continue to live."

The Chief Justice also stated, at page 10 of the Glucksberg opinion:

> The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.
>
> * * *
>
> Given the common law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was

> entirely consistent with this nation's history and constitutional traditions.

My father responded to stimuli, and his EEG reflected significant brain wave functions before the doctors confused and coerced my mother and siblings to allow the life-sustaining treatment to be withheld from my father. See, H. Hendin, Seduced by Death: Doctors, Patients and the Dutch Cure 24-25 (1997); and American Medical Association, Code of Ethics §2.211 (1994). He should never have been euthanized.

B. Substantive Due Process?

As Chief Justice Rehnquist wrote in Glucksberg, supra, the legal basis for refusing unwanted medical treatment is based in part on the common law rule that forced medication was a battery. Ibid. Likewise, this Court has held that in addition to the specific freedoms protected by the Bill of Rights, the liberty protected by the Due Process clause of the Fourteenth Amendment includes the right to bodily integrity. See, Rochin v. California, 342 U.S. 165 (1952).

And again, in Glucksberg, supra, at page 17, the Chief Justice opined:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition" ... and "implicit in the concept of ordered liberty,"

> such that "neither concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed ...." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

Like all Americans, my father possessed a God-given, inalienable, fundamental right to be safe and secure from intentional euthanization, particularly under these circumstances. My mother and siblings were sold a "bill of goods" by Drs. Breaux, Krefft and Rabito. I do not know why they did what they did, but I am convinced that since Dr. Rabito took great pains to tamper with my father's medical file at the hospital, after six months had passed, he knew what he was doing and thus demonstrated concern that the truth might surface if I filed suit.

Finally, if my father's liberty interest – to be free and secure from euthanization during his incompetency – was violated by Drs. Breaux, Krefft, and Rabito, then the fact that they were on staff at and acted in concert with a hospital that receives federal funding, should be a sufficient nexus to permit the inference of State action. See, e.g., West v. Atkins, 487 U.S. 42 (1998); Grove City College v. Bell, 465 U.S. 55 (1984); and Reno v. Flores, 507 U.S. 292 (1993).

C. Right to Privacy

My father, Albert L. LeBreton, Jr., had a fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment. This right is rooted in the common law of battery,

as discussed above. As the Chief Justice noted in Vacco v. Quill, No. 95-1858 (Bench Opinion) (1997), at page 12:

> The right to refuse life-sustaining treatment is based on common law battery. ***** "Our assumption of a right to refuse treatment was grounded not, as the Court of Appeals supposed, on the proposition that patients have a general and abstract 'right to hasten death," but on well established traditional rights to bodily integrity and freedom from unwanted touching.

D. Fundamental Right?

My father's due-process right to privacy was clearly a fundamental right. See, e.g., Bates v. Little Rock, 361 U.S. 516 (1960); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969); Bounds v. Smith, 430 U.S. 817 (1977); Youngblood, supra; Roe v. Wade, supra. Certainly, if the right to bodily integrity discussed in Rochin, supra, was considered a fundamental liberty interest, then the right to bodily integrity is also included as part of the right to privacy.

E. State Action

The doctors who treated my father, and the hospital in which he was treated acted under color of state law. To begin with, the hospital receives federal funding. See, e.g., Reno, supra; and Bell, supra. Further, the doctors believed they were acting under La. Rev. Stat. 40:1299, et seq. I contend that the

doctors in this case acted on the belief that state law sanctioned euthanasia, and that they were thus acting in conformity with state law. See, Dennis v. Sparks, 449 U.S. 24 (1980); and Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991). My father's death was therefore traceable to a right granted to the doctors by state law.

Moreover, the actions of the Louisiana Supreme Court, in dismissing my claim as untimely filed under the statute of limitations, denied my due-process property right to sue for damages for my father's death.

F. Equal Protection Clause Violations

Section 1 of the Fourteenth Amendment provides in part that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This Court has held that the Equal Protection Clause requires states to treat like cases alike. Plyler v. Doe, 451 U.S. 202, 216 (1982).

My father represented a class of people created by state law: persons who are sick and mentally incompetent and who, as a result, are potential victims of euthanasia. See, Cruzan, supra. I also contend that the law created a second class: *relatives* of persons who are sick and mentally incompetent and are thus susceptible of being swayed by the medical profession into euthanizing their sick relatives. In either case there is, or should be, a right to proper treatment free of the coercive tactics of unscrupulous physicians. See, Levy v. Louisiana, 391 U.S. 68 (1968). And this Court has long used an actor's intent or purpose to distinguish between two acts that may have the same result. See, e.g., United States v. Bailey, 444 U.S. 394, 403-406 (1986); and Vacco, supra (Bench Opinion) at p.7.

My father's death was the result of his having been classified as a member of a class of persons whose lives would not be "reasonably meaningful" were he allowed to live. But the subjective evaluation made by Drs. Breaux, Krefft, and Rabito in this case caused not only the removal of the feeding tube, but of I.V. liquids as well as hydration. The fact that my father lingered on, breathing on his own, while he dehydrated and starved to death speaks for itself. His condition was not vegetative. He was only semi-comatose, and was reacting to neurological stimuli.

As Justice O'Connor said in Glucksberg, supra, at pages 2-3 of her concurring opinion:

> Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.

Thus, the State of Louisiana had an interest in protecting the classes of people I mentioned: those on life-sustaining treatment, and their relatives. Yet in this case that protection was not extended.

The Chief Justice also wrote, in Glucksberg, supra, at page 29:

> Next, the State has an interest in protecting vulnerable groups – including the poor, elderly, and disabled persons – from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." 79 F.3d, at 825. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. Cruzan, 497 U.S., at 281.

In this case, my father was euthanized because of pressure exerted by doctors on my mother and siblings to assent to removing all treatment, including water, from my father, despite the fact that he was not brain dead or even comatose. Chief Justice Rehnquist went on in Glucksberg, supra, at page 30:

> The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, neglect and inaccurate stereotypes, and "societal indifference."
>
> Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even industry euthanasia. The Court of Appeals struck down Washington's assisted-suicide ban only as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.

My father was a victim of involuntary euthanasia. He was semi-comatose, and thus mentally incompetent, which classification opened the door for the doctor to coerce my family into assenting to this euthanization.

This Court has also said that the distinction between letting a patient die and making that patient die is important, logical, rational, and well established. It comports with fundamental legal principles of causation, People v. Kevorkian, 447 Mich. 436, 470-472, 527 N.W. 2d 714, 728. cert. denied, 514 U.S. 1083, and intent. Bailey, supra; and Cruzan, supra.

In this case my father was not allowed to die, he was made to die. I contend that where a class is created by law, or results from the action of law, and involves a person's life, a "suspect" classification exists. See, Vacco, supra, (Bench Opinion) p. 4; and Romer v. Evans, 517 U.S. ____, (Slip opinion, at 10) 1996).

I also contend that the actions of the Louisiana Supreme Court, in dismissing my case as *res judicata*, created a classification under the Equal Protection Clause of the Fourteenth Amendment. The class includes all persons similarly situated, whose right to seek redress of their grievances in state court has been terminated by this ruling.

Finally, another classification created by the effects of state law includes those persons who are sick and mentally incompetent, and whose physicians have falsified death certificates and conspired with hospitals to euthanize them. See, Vacco, supra, p. 8. It is beyond cavil that such unequal treatment is not rationally or reasonably related to any legitimate state interest. Amazingly, I later learned that Dr. Krefft had a nephew who had been comatose and on life support for nine months. A police officer in Tennessee was in a coma for over

seven years before suddenly awakening. He is now reunited with his family. There are many cases of people in worse physical condition than my father not only surviving, but recovering to lead meaningful lives. I was denied the chance to help my father recover.

CONCLUSION

My mother and siblings were talked into removing all life-sustaining treatment from my father, Albert L. LeBreton, Jr., after he had been admitted to a New Orleans hospital for a heart attack. Although empirical medical data clearly indicated that he was only semi-comatose, and had significant brain and neurological function, his physicians convinced my relatives to assent to the removal not only of the feeding tube, but of all intravenous fluids, water, and antibiotics. My father was intentionally given a death sentence by the doctors who were supposed to be treating him.

My father's and my constitutional rights were violated by the actions of the doctors, acting under color of state law, and by the actions of the Louisiana Supreme Court in dismissing my case on the basis of unorthodox interpretation of two seemingly conflicting state laws. All I am asking is to have my day in court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dr. Diana Le Breton

Dr. Diana LeBreton, In Proper Person

Date: April 30, 2003

SUPREME COURT OF THE STATE OF LOUISIANA

2002-C-2857

DIANA LeBRETON

versus

PENDLETON MEMORIAL METHODIST HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D., AND THOMAS A. KREFFT, M.D.

In Re: LeBreton, Diana; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. B, Nos. 2001-13435; to the Court of Appeal, Fourth Circuit, No. 2002-CA-0801

January 31, 2003
Denied.

JTK
PFC
CDK
BJJ
JPV
CDT
JLW

Supreme Court of Louisiana
January 31, 2003

/s/ Rai T. Daigle
Deputy Clerk of Court
for the Court

NOT DESIGNATED FOR PUBLICATION

DIANA M. LEBRETON	*** NO. 2002-CA-0801**
VERSUS	*** COURT OF APPEAL**
PENDLETON MEMORIAL METHODIST HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D., AND THOMAS A. KREFFT, M.D.	*** FOURTH CIRCUIT** ***STATE OF LOUISIANA** ***** *****

****

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-13435, DIVISION "B-15"
Honorable Rosemary Ledet, Judge

****

Judge David S. Gorbaty

****

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones, Judge David S. Gorbaty)

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AFFIRMED

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE #198

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 20th day of February, 2003, the following action was taken by the Supreme Court of Louisiana in the case listed below:

REHEARINGS DENIED:

2002-C-2857	DIANA LEBRETON V. PENDLETON MEMORIAL METHODIST HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D., AND THOMAS A. KREFFT, M.D.

Supreme Court, U.S.
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THOMAS A. KREFFT, M.D.**

ON PETITION FOR WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2001-13435 SECTION 15 DIVISION "B"

DIANA M. LEBRETON

VERSUS

PENDLETON MEMORIAL HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D. and THOMAS A. KREFFT, M.D.

FINAL JUDGMENT

This matter came up for hearing on November 9, 2001 on Exceptions of *Res Judicata* and, in the Alternative, Prescription, Peremption, No Cause of Action and No Right of Action filed by defendants, Patrick C. Breaux, M.D., and Felix O. Rabito, M.D., and on Exceptions of Prescription, Peremption, No Cause of Action, and No Right of Action filed by Pendleton Memorial Methodist Hospital.

Present: Arthur F. Hickham, Jr.-attorney for Patrick C. Breaux, M.D., and Felix O. Rabito, M.D.

Richard E. Gruner, Jr.- attorney for Pendleton Memorial Methodist Hospital; and

Richmond C. Odom - attorney for plaintiff, Diana LeBreton.

After reviewing the pleadings submitted, and after hearing argument of counsel, the court, being of the opinion that the law and evidence are in favor of the defendants, Patrick C. Breaux, M.D., Felix O. Rabito, M.D., and Pendleton Memorial Methodist Hospital;

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that the Exception of *Res Judicata* filed by Drs. Breaux and Rabito be and is hereby maintained; and the Exception of Prescription filed by Pendleton Memorial Methodist Hospital be and is hereby maintained; because of this ruling the other Exceptions filed by the defendants are moot; and all of plaintiff's claims are dismissed with prejudice.

Judgment rendered on the 9th day of November, 2001.

Judgment signed on the 14th day of November, 2001.

s/Judge Rosemary Ledet

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2001-13435 SECTION 15 DIVISION "B"

DIANA M. LEBRETON

VERSUS

PENDLETON MEMORIAL HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D. and THOMAS A. KREFFT, M.D.

FINAL JUDGMENT

This matter came up for hearing on January 4, 2002, on plaintiff's Motion to Set Aside Judgment and defendant, Thomas A. Krefft, M.D.'s, Exception of *Res Judicata* and, in the Alternative, Prescription, Peremption, No Cause of Action and No Right of Action.

Present: Arthur F. Hickham, Jr.-attorney for Patrick C. Breaux, M.D., and Felix O. Rabito, M.D.

Richard E. Gruner, Jr.- attorney for Pendleton Memorial Methodist Hospital; and

Richmond C. Odom - attorney for plaintiff, Diana LeBreton.

After reviewing the pleadings submitted, and after hearing argument of counsel, the court, being of the opinion that the law and evidence are in favor of the defendants, Thomas Krefft, M.D., Patrick M. Breaux, M.D., Felix O. Rabito, M.D., and Pendleton Memorial Methodist Hospital.

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that the Motion to Set Aside Judgment filed by plaintiff, Diana LeBreton, is denied and the Exception of *Res Judicata* and, in the Alternative, Prescription, Peremption, No Cause of Action and No Right of Action filed by Thomas Krefft, M.D., be and is hereby maintained; and further that all of plaintiff's claims against all defendants are hereby dismissed with prejudice.

Judgment rendered on the 4th day of January, 2002.

Judgment signed on the 11th day of January, 2002.

s/ Judge Rosemary Ledet

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2001-13435 SECTION 15 DIVISION "B"

DIANA M. LEBRETON

VERSUS

PENDLETON MEMORIAL HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D., and THOMAS A. KREFFT, M.D.

Reasons for Judgment

The earlier judgment in connection with plaintiff's wrongful death claim filed in August 1992, maintaining the Exceptions of Prescription filed by Drs. Rabito, Breaux, and Krefft constituted a final judgment. Louisiana's res judicata doctrine bars relitigation of claims and issues arising out of the same factual circumstances if there is a valid final judgment. Duffy v. SI-SIFH Corp., 726 So.2d 438 (La. App. 4th Cir. 1999). Therefore, the Exception of Res Judicata filed by defendants, Patrick M. Breaux, M.D. and Felix O. Rabito, M.D. is granted.

Additionally, the Exception of Prescription filed by Pendleton Memorial Methodist Hospital is granted. The cause of action subject of the instant suit occurred in August 1991. La. R.S. 9:5628 provides a three year prescriptive period from the date of the alleged malpractice in which to file suit. Clearly,

plaintiff's claim has prescribed and Ms. LeBreton has not carried her burden of proving an interruption or suspension of prescription. Consequently, plaintiff's suit is dismissed with prejudice.

NOT DESIGNATED FOR PUBLICATION

DIANA M. LeBRETON	*	**NO. 2002-CA-0801**
	*	
VERSUS	*	**COURT OF APPEAL**
	*	
PENDLETON MEMORIAL	*	**FOURTH CIRCUIT**
METHODIST HOSPITAL,	*	
PATRICK C. BREAUX, M.D.,	*	**STATE OF**
FELIX O. RABITO, M.D., and	*	
THOMAS A. KREFFT, M.D.	*	**LOUISIANA**
	*	

* * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-13435, DIVISION "B-15"
Honorable Rosemary Ledet, Judge

* * * * * *

Judge David S. Gorbaty

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones, Judge David S. Gorbaty)

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AFFIRMED

Diana M. LeBreton appeals a judgment in which her Motion to Set Aside Judgment was denied, and an Exception of Res Judicata filed on behalf of Dr. Thomas Krefft was maintained. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEEDINGS BELOW:

Diana LeBreton's father was brought to Pendleton Memorial Hospital on August 13, 1991, after suffering a heart attack. Mr. LeBreton was unconscious and was placed on life support. On August 18, the decision was made to remove the patient from life support.[1] Mr. LeBreton died on August 20, 1991.

Diana LeBreton originally filed suit against Drs. Felix O. Rabito, Patrick C. Breaux, and Thomas A. Krefft in August of 1992. In her petition, she alleged that the doctors' decision to remove her father from life support constituted intentional acts, and, therefore, were not covered by the Medical Malpractice Act. Rather, the doctors' actions were a violation of the Louisiana constitutional provision prohibiting euthanasia. Despite her argument that her cause of action did not arise under the Medical Malpractice Act, Ms.LeBreton filed a request for review by a medical review panel shortly after filing her petition. All three defendants filed exceptions of prematurity in the trial court, which were granted, dismissing plaintiff's suit, without prejudice. Ms. LeBreton did not challenge that ruling.

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[1]It is contested whether or not Mrs. LeBreton, plaintiff's mother, gave permission to remove her husband from life support.

In August of 1996, the medical review panel issued its findings in favor of the three doctors. Ms. LeBreton did not refile her lawsuit until February of 1997, more than ninety days after the ruling of the review panel. The doctors filed exceptions of prescription, which were denied by the trial court, and applied for supervisory writs to this Court, which denied the writs. However, the Supreme Court granted the doctors' writ, and reversed the ruling of the trial court. *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So.2d 1226.

In *LeBreton*, *supra*, the Supreme Court overruled *Hernandez v. Lafayette Bone & Joint Clinic*, 467 So.2d 113 (La. App. 3 Cir. 1985), a decision that approved the simultaneous application of interruption **and** suspension of prescription in a medical malpractice case. The Court explained that the filing of a request for review by a medical review panel triggered the suspension of prescription specially provided by the Medical Malpractice Act, rather than interruption of the liberative prescriptive period provided in the Civil Code. The Court, having overruled *Hernandez*, ordered, adjudged and decreed on July 8, 1998, that the "wrongful death action of Diana LeBreton against Drs. Felix O. Rabito, Patrick C. Breaux, and Thomas A. Krefft is dismissed with prejudice."

On August 17, 2001, Ms. LeBreton filed another suit against Drs. Rabito, Breaux, and Krefft, and named as an additional defendant, Pendleton Memorial Methodist Hospital (hereinafter Methodist Hospital). Based on facts identical to the earlier filed lawsuit, she alleged that the defendant doctors and hospital violated her father's due process rights under the Louisiana Constitution by removing him from life support, and that the doctors' actions were in violation of the Louisiana Unfair Trade Practices Act. An amended petition was filed on

September 13, 2001, that included additional factual allegations.

In response to the petitions, Drs. Rabito and Breaux filed an exception of *res judicata*, and, alternatively, exceptions of prescription, peremption, no cause of action and no right of action. Methodist Hospital filed exceptions of prescription, peremption, no cause of action and no right of action. At the time of the hearing, Dr. Krefft had not been served with the original or amended petition. The trial court rendered judgment on November 14, 2001, maintaining the doctors' exceptions of *res judicata* and Methodist Hospital's exception of prescription, and dismissing plaintiff's claims as to those defendants, with prejudice.

On November 26, 2001, Ms. LeBreton filed a motion to set aside judgment, memorandum in support, and a request for written reasons for judgment. She also informed the clerk that Dr. Krefft had relocated to Florida and requested service pursuant to the Long Arm Statute. In her memorandum in support of her motion to set aside judgment, Ms. LeBreton argued that because the defendants were jointly and severally liable for the damages claimed, it was improper to dismiss her claims against the other defendants prior to Dr.Krefft being served.

Dr. Krefft was eventually served, on December 11, 2001, he also filed an exception of *res judicata*, and, in the alternative, exceptions of prescription, peremption, no cause of action and no right of action, and a motion and order to set the exceptions for hearing. The trial court set Dr. Krefft's exceptions and plaintiff's motion to set aside the judgment for hearing on January 4, 2002.

On January 11, 2002, the trial court rendered judgment denying plaintiff's motion to set aside the judgment and maintaining Dr. Krefft's exceptions.[2] The trial court also assigned written reason for both the November 14 and the January 11 judgments. The court explained that the July 8, 1998, ruling by the Supreme Court granting the exception of prescription filed by Drs. Rabito, Breaux and Krefft constituted a final judgment. Because the allegations of the August 2001 lawsuit arose from the same factual circumstances as the earlier lawsuit, the doctrine of *res judicata* applied. Further, because the cause of action alleged in the instant lawsuit occurred in August of 1991, plaintiff's claims against Methodist Hospital had clearly prescribed.

Ms. LeBreton filed a motion and order for appeal on February 15, 2002, requesting a suspensive appeal from the judgment of January 11, 2002, which was granted.

DISCUSSION:

In her first assignment of error, Ms. LeBreton claims the trial court erred in sustaining the exception of *res judicata* in favor of Drs. Rabito and Breaux because there was never a final judgment on the merits in the earlier filed lawsuit.

This issue is not properly before this Court because Ms. LeBreton has not appealed the judgment maintaining the exception of *res judicata*. Rather, she appealed the judgment of January 11, 2001, which was the denial of her motion to set aside judgment. The motion to set aside judgment was brought

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[2]The judgment maintains all of the urged exceptions. However, based on the earlier judgment of November 14, 2001, it would appear that the exception of *res judicata* was maintained, rendering the remaining exceptions moot.

pursuant to La. Code Civ. Proc. arts. 2002 and 2004, both actions of nullity. The filing of a petition to annul a judgment does not suspend the delays for taking a suspensive appeal. La. Code Civ. Proc. art. 2123. Therefore, she had not timely appealed the November 14, 2001, judgment maintaining the exception of *res judicata* as to Drs. Rabito and Breaux.[3] Further, because Ms. LeBreton has not briefed the issue of trial court error for denying her motion to set aside, we consider that issue abandoned. Uniform Rules - Courts of Appeal 2-12.4.

In her second assignment of error, Ms. LeBreton claims that the trial court's judgment of November 12, 2001, erroneously dismissed the claims against Dr. Krefft, because Dr. Krefft had not yet been served. Additionally, Ms.LeBreton argues that the trial court erred in entertaining the exception of *res judicata* filed by Dr. Krefft after he was finally served with the petition, because he had already been dismissed from the lawsuit. Further, the trial court improperly considered the exception on January 4, 2002, when only her motion to set aside judgment should have been heard. She claims that she was not prepared for a hearing on the exceptions because she was not aware that the exceptions would be heard that day.

Our review of the record indicates that the November 14, 2001, judgment dismissed the claims against Drs. Rabito and Breaux, and Methodist Hospital only. The judgment does not dismiss the claims against Dr. Krefft. Thus, that argument lacks merit. Accordingly, Dr. Krefft did **not** file his exception after

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[3]Methodist Hospital has filed an appellee brief in this case; however, as stated *infra*, no timely appeal was taken of the November 14 judgment dismissing the claims against the hospital, nor did plaintiff brief any assignments of error as to Methodist.

being dismissed. Further, on December 11, 2001, the same day he filed his exceptions, Dr.Krefft filed a motion and order to set exceptions for hearing. The trial court set January 4 as the hearing date. The record further indicates that Ms. LeBreton's attorney was served with the exceptions on December 20. Therefore, Ms. LeBreton's argument that the trial court improperly considered Dr.Krefft's exceptions at a hearing set only for her motion to set aside judgment is baseless.[4]

For the reasons assigned, we affirm the judgment of the trial court.

AFFIRMED

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[4]Ms. LeBreton does not argue the merits of the trial court's maintaining Dr. Krefft's exceptions. Accordingly, we will not consider that issue.

(3)

No. 03-60

In the Supreme Court of the United States

DIANA LEBRETON

Petitioner

versus

PENDLETON MEMORIAL METHODIST HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO,M.D. and THOMAS A. KREFFT, M.D.

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE LOUISIANA SUPREME COURT

BRIEF OF PENDLETON MEMORIAL METHODIST HOSPITAL IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether or not this Honorable Court should exercise its discretionary review under 28 USC 1257(a) to grant a writ of certiorari to review determinations of state law made by the Louisiana Supreme Court.

PARTIES TO THE PROCEEDING

1) Dr. Diana LeBreton

2) Pendleton Memorial Methodist Hospital

3) Patrick C. Breaux, M.D.

4) Felix O. Rabito, M.D.

5) Thomas A. Krefft, M.D.

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

The opinions below and jurisdictional statement were presented correctly by the petitioner.

STATUTORY PROVSIONS INVOLVED

This case involves Louisiana Revised Statute 9:5628.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2003

DR. DIANA LEBRETON
Petitioner

versus

PENDLETON MEMORIAL METHODIST HOSPITAL,
PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D.
and THOMAS A. KREFFT, M.D.
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE UNITED STATES FROM THE
LOUISIANA SUPREME COURT

BRIEF OF PENDLETON MEMORIAL METHODIST HOSPITAL IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is ostensibly a medical malpractice action arising out of medical treatment rendered to Albert LeBreton, Jr. at Pendleton Memorial Methodist Hospital (PMMH) over a decade ago. The plaintiff, Mr. LeBreton's daughter, has sued PMMH and three physicians involved in the decision (admittedly supported by Mr. LeBreton's wife, the plaintiff's mother) to terminate her father's life support following his apparent heart attack in August of 1991. The present action is the second action filed by the plaintiff arising out of the death of her father.

The plaintiff filed her first action, a wrongful death claim, in the Civil District Court for the Parish of Orleans on August 18, 1992. In that action, she sued only the three physicians,[1] alleging that the "deliberate act of euthanasia" by the physicians caused her father's death. The following day, on August 19, 1992, the plaintiff also filed a request for review by a medical review panel pursuant to the Medical Malpractice Act, La. R.S. 40:1299.41 et seq. Pursuant to the Medial Malpractice Act, the defendants filed exceptions of prematurity in the civil district court action, which were granted by the trial court, dismissing the plaintiff's action without prejudice.

On August 12, 1996, the medical review panel issued its opinion in favor of the three physician defendants, finding that no medical malpractice had occurred. Plaintiff's attorney was notified of the opinion on August 14, 1996, but did not refile the civil district court action until over five months later. Because Lousiana requires that suit be instituted within ninety days of the receipt of the medical review panel opinion, the physician defendants filed exceptions of prescription, which were maintained by the Louisiana Supreme Court after being initially overruled by the trial court and court of appeal. The Supreme Court's judgment dismissed the plaintiff's action with prejudice.

Nearly a decade after Mr. LeBreton's death and over three years after the Louisiana Supreme Court's decision dismissing the plaintiff's action as prescribed, the plaintiff filed the present action arising out of the very same facts and

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[1] PMMH was not sued in the plaintiff's first action.

circumstances as her first action. The second action differed from the first action only in that the plaintiff's petition included PMMH as a defendant and purported to make claims based upon the Louisiana Unfair Trade Practices and Consumer Protection Law and the due process clause of the Louisiana Constitution.

In response to the plaintiff's petition in the present action, the physician defendants filed exceptions of *res judicata*, prescription, peremption, and no right/cause of action.

PMMH filed an exception of prescription, along with exceptions of peremption, no right of action, and no cause of action. The trial court maintained the physician defendants' exception of *res judicata* and PMMH's exception of prescription, and ruled that the remaining exceptions were moot:

> IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that the Exception of *Res Judicata* filed by Drs. Breaux and Rabito be and hereby is maintained; and the Exception of Prescription filed by Pendleton Memorial Methodist Hospital be and hereby is maintained; because of this ruling the other Exceptions filed by the defendants are moot; and all of plaintiff's claims are dismissed with prejudice.

See Judgment of the Trial Court, contained in Petitioner's Appendix 1, page 2.

In the court's reasons for judgment,[2] the court was likewise clear that while the physician defendants were dismissed on the basis of *res judicata*, the dismissal of PMMH was based upon prescription:

> The earlier judgment in connection with plaintiff's wrongful death claim filed in August 1992 maintaining the Exceptions of Prescription filed by Drs. Rabito, Breaux, and Krefft constituted a final judgment. Louisiana's *res judicata* doctrine bars relitigation of claims and issues arising out of the same factual circumstances if there is a valid final judgment. *Duffy v. SI-SIFH Corp.*, 726 So. 2d 438 (La. App. 4th Cir. 1999). Therefore, the Exception of Res Judicata filed by defendants, Patrick M. Breaux, M.D. and Felix O. Rabito, M.D. is granted.
>
> Additionally, the Exception of Prescription filed by Pendleton Memorial Methodist Hospital is granted. The cause of action subject of the instant suit occurred in August 1991. La. R.S. 9:5628 provides a three year prescriptive period from the date of the alleged malpractice in which to file suit. Clearly, plaintiff's claim has prescribed and Ms. LeBreton has not carried her burden of proving an interruption or suspension of prescription.

See Petitioner's Appendix 1 at page 5.

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[2] Plaintiff filed a motion to set aside the trial court's judgment on grounds unrelated to PMMH. The court then issued another Final Judgment, (Petitioner's Appendix 1 at page 3), and Reasons for Judgment (Petitioner's Appendix 1 at page 5).

The plaintiff then appealed the trial court's judgment. In her motion for appeal, the plaintiff did not specify as to which defendants and/or which portions of the trial court's judgment she was appealing. Similar to her United States Supreme Court brief, wherein PMMH is named as a respondent but not discussed in the body of the brief, the plaintiff named PMMH as an appellee, but described only the *res judicata* component of the trial court's ruling.

Similarly, the plaintiff's Original Brief on appeal discussed only the *res judicata* component of the trial court's ruling; nowhere in her Assignment of Errors, Issues Presented for Review, or Argument did the plaintiff raise any arguments relating to the trial court's ruling granting PMMH's exception of prescription. See Petitioner's Appendix 1 at page 7, et seq.

The Court of Appeal for the Fourth Circuit of Louisiana unanimously affirmed the district court's judgment maintaining the physician defendants' exceptions of *res judicata* and PMMH's exception of prescription. See Petitioner's Appendix 1 at 14.

Plaintiff then applied for a writ of certiorari and/or review to the Louisiana Supreme Court, which unanimously denied the request.

From that denial, petitioner has brought the present writ application.

SUMMARY OF ARGUMENT

Petitioner's writ application presents no special and important reasons for granting the writ of certiorari. None of the considerations found in Rule 10 of the Rules of the Supreme Court are present in this case. The claims against PMMH are prescribed by operation of state law. Petitioner's repeated and incomprehensible suggestions that the physician defendants and the Louisiana Supreme Court violated constitutional law are unsupported. However, even if this Court were to somehow determine that the petitioner had raised cognizable legal issues with regard to the lower court determinations of *res judicata*, nowhere in the petitioner's brief does she address the fact that PMMH was dismissed pursuant to an exception of prescription, which was clearly supported by Louisiana state law.

Because the petitioner's writ application does not address the trial court's ruling that her claim against PMMH is prescribed, PMMH is unsure whether the plaintiff intended to seek review of this issue. Out of an abundance of caution, PMMH has filed this respondent's brief.

ARGUMENT

THE CONSIDERATIONS FOUND IN RULE 10 OF THE RULES OF THE SUPREME COURT ARE NOT PRESENT IN THIS CASE

Rule 10 of the Rules of the Supreme Court provides in part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a

writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b)a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As is clear from a review of Petitioner's Questions Presented, none of the "character of reasons" found in Rule 10 are present in this case.

PETITIONER'S CLAIMS AGAINST PMMH ARE PRESCRIBED BY OPERATION OF STATE LAW

Petitioner, Dr. Diana M. LeBreton, filed the lawsuit to which her writ of certiorari is related on August 17, 2001 essentially alleging that on or about August 13, 1991, her father, Albert L. LeBreton, Jr., was admitted to PMMH after suffering an apparent heart attack; that he was revived in the Emergency Room and moved to the ICU; that he remained in the ICU until August 18, 1991; that during that time he was intubated and given water and antibiotics intravenously; that during the morning of August 18, 1991, Dr. Patrick Breaux ordered the removal of the feeding tubes and IVs; that as a result of the removal of the feeding tubes and IVs Mr. LeBreton died on August 20, 1991. She further alleged that she vigorously objected to the decision to take Mr. LeBreton off life support. Petitioner also alleged violations of The Louisiana Constitution and The Louisiana Unfair Trade Practices Act.

Because plaintiff's claims arise out of the medical treatment of her father, they are medical malpractice claims under Louisiana law. See Louisiana Revised Statute 40:1299.41, et seq. As such, they are subject to the prescriptive/peremptive periods provided by Louisiana Revised Statute 9:5628. Pursuant to that statute, a plaintiff has one year from the date of the alleged act, omission or neglect, or one year from the date of discovery of the alleged act, omission or neglect within which to institute suit. However, Louisiana Revised Statute 9:5628 also provides that even as to claims filed within one year of the date of discovery, all claims must be filed, at the latest, within a period of three years from the alleged act, omission or neglect. Clearly, the causes of action pled by plaintiff

against PMMH, which were filed almost ten years after the alleged act, omission or neglect, are prescribed as a matter of Louisiana law.

Louisiana law is clear that "the burden of proof is normally on the party pleading prescription; however, if on the face of the petition it appears that prescription has run ... the burden shifts to the plaintiff to prove a suspension or interruption of the prescriptive period." *Younger v. Marshall Industries, Inc.*, 92-3134 (La. 5/24/93); 618 So. 2d 866, 869; *Wimberly v. Gatch*, 93-2361 (La. 4/11/94); 635 So. 2d 206. Because medical malpractice, wrongful death and survival actions prescribe one year from the date of the alleged malpractice or death, and because the August 17, 2001 complaint naming PMMH as defendant was filed almost ten years after Mr. LeBreton's death and the alleged malpractice, the complaint prescribed on its face and petitioner bore the burden at the hearing of this matter to prove an interruption or suspension of prescription.

Petitioner was unable to sustain her burden of proving an interruption or suspension of prescription. Because petitioner's claims were filed almost ten years after the date of the alleged malpractice, her claims were prescribed pursuant to Louisiana law and the Louisiana courts were correct in dismissing petitioner's claims against PMMH.

STATUTES OF LIMITATION CARRY A STRONG PRESUMPTION OF CONSTITUTIONALITY

Statutes of limitation, such as the prescriptive/peremptive periods provided by Louisiana Revised Statute 9:5628, represent pervasive legislative judgments that it is unjust to

fail to put one's adversary on notice that it will be necessary defend a claim within a certain period of time. *U. S. v. Kubrick*, 100 S.Ct. 352, 444 U.S. 111, 62 L.Ed.2d 259.

"It is generally within the sound discretion of the legislature to enact statutes of limitation. Such statutes carry a strong presumption of constitutionality." *Brubaker v. Cavanaugh*, 741 F.2d 318 (C.A.10 1984), citing *Flemming v. Nestor*, 80 S.Ct. 1367, 1376, 363 U.S. 603, 617, 4 L.Ed.2d 1435.

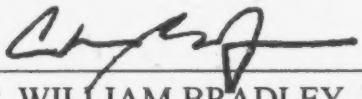
CONCLUSION

Petitioner has offered no evidence that the state courts who have examined this case applied the wrong statute of limitations to her claims against PMMH. Nor has she suggested that the statute of limitations is unconstitutional. She has offered no such arguments because there is no basis for such arguments. Petitioner's claims arise from allegations of medical malpractice as defined by Louisiana law. The applicable statute of limitations, which enjoys a presumption of constitutionality, clearly requires that all claims must be brought within 3 years of the date of the alleged malpractice. Petitioner failed to put PMMH on notice that it might have to defend claims arising from the decision of her mother to discontinue life support to her father in its facility for a period of about 10 years. The state courts who examined petitioner's claims properly determined that her claims against PMMH had prescribed.

Petitioner's claims, even if they met the requirements of Rule 10, which they do not, are time barred as to PMMH. Petitioner's writ application is absolutely devoid of any argument explaining either that the applicable statute of limitation is unconstitutional or that it does not apply to her claims against PMMH. Petitioner's failure to comply with the statute of limitations and her failure to set forth an argument that the statute was either improperly applied or was unconstitutional requires that her writ application be denied as it relates to PMMH.

Respectfully submitted,

Lemle & Kelleher, L.L.P.

BY: 

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Supreme Court, U.S.
FILED
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No.

03-60

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

DR. DIANA LeBRETON - PETITIONER

VS.

PENDLETON MEMORIAL METHODIST HOSPITAL,
PATRICK C. BREAUX, M.D.,
FELIX O. RABITO, M.D., and
THOMAS A. KREFFT, M.D.

ON PETITION FOR WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

PETITION FOR REHEARING

Dr. Diana LeBreton
16050 Plank Road
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(225) 356-3489

14 pp

QUESTIONS PRESENTED FOR REVIEW

1) Did Petitioner's father have a liberty interest under the Due Process Clause of the Fourteenth Amendment to be reasonably safe and secure from intentional euthanization at a time when he was mentally incompetent? If so, was this liberty interest a "fundamental" right?

2) Did Petitioner's father have a right to privacy under the Due Process Clause of the Fourteenth Amendment which included the right to be reasonably safe and secure from intentional euthanization at a time when he was mentally incompetent? If so, was this right to privacy a fundamental right?

3) If the hospital in which Petitioner's father was intentionally euthanized, and the doctors who euthanized Petitioner's father acted under color of law, did their actions amount to "State Action"?

4) Did the Louisiana Supreme Court deny Petitioner's right to property under the Due Process Clause of the Fourteenth Amendment when it denied Petitioner's application for writ of certiorari and/or review in the manner done?

5) Is "relatives of persons who are sick and mentally incompetent" a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is it a "suspect class"?

6. Did the actions of the Louisiana Supreme Court, in denying Petitioner's application for writ of certiorari and/or review on the basis of *res judicata* create a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is this a "suspect class"?

7. Is "sick and mentally incompetent adults whose physicians have falsified death certificates and conspired with hospitals to euthanize them" a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is this a "suspect class"?

RULE 44.2 CERTIFICATION OF COUNSEL

Pursuant to Rule 44.2, the grounds of this rehearing are limited to intervening circumstances of a controlling and substantial effect and to other grounds not previously presented.

It is presented in good faith and not for delay of the Court.

Dr. Diana LeBreton

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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JURISDICTION

[x] For cases from state courts:

The date on which the highest state court decided my case was January 31, 2003. A copy of that ruling appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 1
U.S. Const. amend. 14, § 1
28 U.S.C. § 1257(a)
Supreme Court Rules, Rules 10.1(c), 44
La. Civ. Code art. 3462
La. Rev. Stat. 40:1299.47(A)(2)(a)

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE PETITION FOR REHEARING

When my father, Albert L. LeBreton, Jr., was admitted to Pendleton Memorial Methodist Hospital in New Orleans, Louisiana, on August 13, 1991, the diagnosis was acute myocardial infarction, with brief cessation of pulse and breathing in the ambulance en route to the hospital. He was successfully revived at the hospital and ventilated by endotracheal intubation. He was able to breath on his own after that.

Between his admission on August 13, and his death one week later, my father's condition actually improved, yet his attending physicians made the highly subjective decision to recommend the radical procedure of withdrawing all life-sustaining treatment. Our family, with the exception of myself, was persuaded by the doctors to discontinue food, hydration, antibiotic therapy, and intravenous fluids, effectively starving my father to death.

Despite being diagnosed repeatedly as "semi-comatose," rather than comatose; despite exhibiting only "moderate brain injury" on the Glascow Coma Scale; and despite showing definite neurological improvement on electroencephalographs (EEGs), the doctors nonetheless concluded that my father should be removed from life-sustaining treatment. In their subjective opinions his life would be "less meaningful" if he recovered.

On August 15, 1991, a neurologist not associated with the case advised that, based on an EEG, and the fact that my father was breathing on his own and blinking his eyes

spontaneously, he had improved neurologically and was responding to auditory stimuli. My father had also withdrawn from a pin prick.

Despite these clear indications of his ability to recover over a period of time, that same day Dr. Thomas Krefft wrote on my father's chart that his recovery would not be "meaningful." The next day, Dr. Krefft announced that he disagreed with the other neurologist's findings. On August 17, 1991, Dr. Patrick Breaux stated that in his view the prognosis was "poor" for my father's "meaningful recovery." The next day Dr. Breaux suggested to my mother, Frances, that "any artificial means of support" should be discontinued. My mother, who was completely mentally distraught by that time, reluctantly accepted what happened. We then asked Dr. Felix Rabito, the third physician treating my father, if the I.V. drip could be reconnected. His response was that he would have waited longer, but he supported the action of withdrawal.

At the time it was not explained to her that this meant withdrawal of the feeding tube, all intravenous liquids, all hydration, and all medication (which is what the doctors meant by "artificial means of support"). She thought only the feeding tube would be removed. Early on Sunday morning, without the family around, Dr. Breaux ordered the withdrawal of all food, hydration, intravenous fluids, and medication.

The withdrawal of life-sustaining treatment created significant strife in my family. As a result, Dr. Rabito tried to reconcile the family's differences. However, despite my repeated protests, and my mother's vacillation, Dr. Rabito refused to reinstate life-sustaining treatment. During this time frame, Dr. Breaux grew more forceful, even telling my mother that "we're all dying," in response to her question whether or

not her husband was dying as a result of the doctors' actions. When my mother asked if the "I.V." could be reinserted, Dr. Breaux, to support his actions, lied and said my father's "veins could not take it."

On August 19, despite having been off life-sustaining treatment for over twenty-four hours, my father was "stable from a cardiac standpoint." Another EEG likewise revealed only "moderately severe diffuse encephalopathy." Again, despite his ostensibly improving condition, life-sustaining treatment continued to be withheld. I commented to a nurse, on viewing my father, whose eyes were open, that he looked good. The nurse just laughed. After asking the nurse if she could give my father a sip of water, she replied that she could not, but that I could if I wanted to. I tried to pour water into his mouth but he started to choke, and I had to stop.

Albert L. LeBreton, Jr., died on August 20, 1991, at 4:00 o'clock in the afternoon. He was gasping for breath until the very end, yet the nurses were prohibited from ventilating him because of the orders of Drs. Krefft, Breaux, and Rabito. At the time those orders were given it was unlawful in Louisiana to withdraw food and water regardless of the circumstances.

Dr. Rabito advised that the cause of death was a stroke, but on the Death Certificates given to my family the cause of death had been left blank. Two weeks later three other causes of death were recorded. Six months later Dr. Rabito made a note in the hospital records that my father had been "brain dead" prior to the pronouncement of death at 4:00 p.m. on August 20; however, his EEGs had consistently reflected brain-wave activity and neurological function.

There were no advance directives with respect to my father's treatment or lack thereof; no proxy signed by him; no

"living will"; no durable power of attorney; and no court order. The doctors repeatedly told me and my family that they would "know something in three days." For the record, even given the state of technological medical advancements in 1991, many people have survived and recovered after having been declared "brain dead," or having been deeply comatose.

Even today, as we hear the hue and cry over the decision of Michael Schiavo to remove feeding tubes from his wife, Teri, and the subsequent action by Florida Governor, Jeb Bush, to reverse that decision, this issue assumes public pre-eminence.

In my original suit in Louisiana, I alleged that Drs. Krefft, Breaux and Rabito intentionally euthanized my father by providing my mother, and my siblings incorrect information about my father's medical condition. His death has left my mother and me psychologically traumatized. Worse, however, I fear that other relatives of semi-comatose persons may lose their loved ones as a result of being similarly misinformed by physicians bent on euthanizing those whom they subjectively determine might not have the best quality of life after recovery.

After the suit was filed, it was dismissed without prejudice, pending review by a panel of physicians, and ruling by that panel. My counsel at the time failed to reinstate the suit in a timely manner, and it was dismissed with prejudice.

In a subsequent suit in state district court, based on different claims and legal theories, I had hoped the court would apply the ten-year statute of limitations for personal actions. That suit was dismissed as *res judicata*, on the basis of having already been litigated in the first suit, despite the fact that in order for *res judicata* to apply in Louisiana, the previous suit had to have involved identical parties and claims, and had to have been a "final judgment on the merits."

But, procedurally, in the first suit the trial court denied the defendants' objections; the court of appeal affirmed; and the Louisiana Supreme Court reversed. Therefore, there was never a final judgment on the merits. The trial court's ruling was interlocutory. Moreover, in the second suit I added the hospital as a defendant, and asserted different claims.

My rights, and those of my father, under the Due Process and Equal Protection clauses of the Fourteenth Amendment, have been infringed upon by the actions of Drs. Krefft, Breaux, and Rabito, and by those of Pendleton Memorial Methodist Hospital. Moreover, the state of Louisiana also infringed on those rights by ruling that the prior case was *res judicata* when the decree was interlocutory, and not final in nature.

CONCLUSION

My mother and siblings were talked into removing all life-sustaining treatment from my father, Albert L. LeBreton, Jr., after he had been admitted to a New Orleans hospital for a heart attack. Although empirical medical data clearly indicated that he was only semi-comatose, and had significant brain and neurological function, his physicians convinced my relatives to assent to the removal not only of the feeding tube, but of all intravenous fluids, water, and antibiotics. My father was intentionally given a death sentence by the doctors who were supposed to be treating him.

My father was a graduate of the United States Naval Academy at Annapolis. He took good care of himself, physically, all his adult life. He was a fighter with a strong will to live. It is human nature to survive. My father, like most

people facing death, would have fought hard to live, had he been able to make that decision on his own. Instead, a group of self-serving doctors were able to persuade my distraught family to allow them to make the choice for him.

My father's and my constitutional rights were violated by the actions of those doctors, acting under color of state law, and by the actions of the Louisiana Supreme Court in dismissing my case on the basis of unorthodox interpretation of two seemingly conflicting state laws. I have never had my day in court. I owe it to my father to see that that happens.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dr. Diana LeBreton

Dr. Diana LeBreton, In Proper Person
Date: October 28, 2003